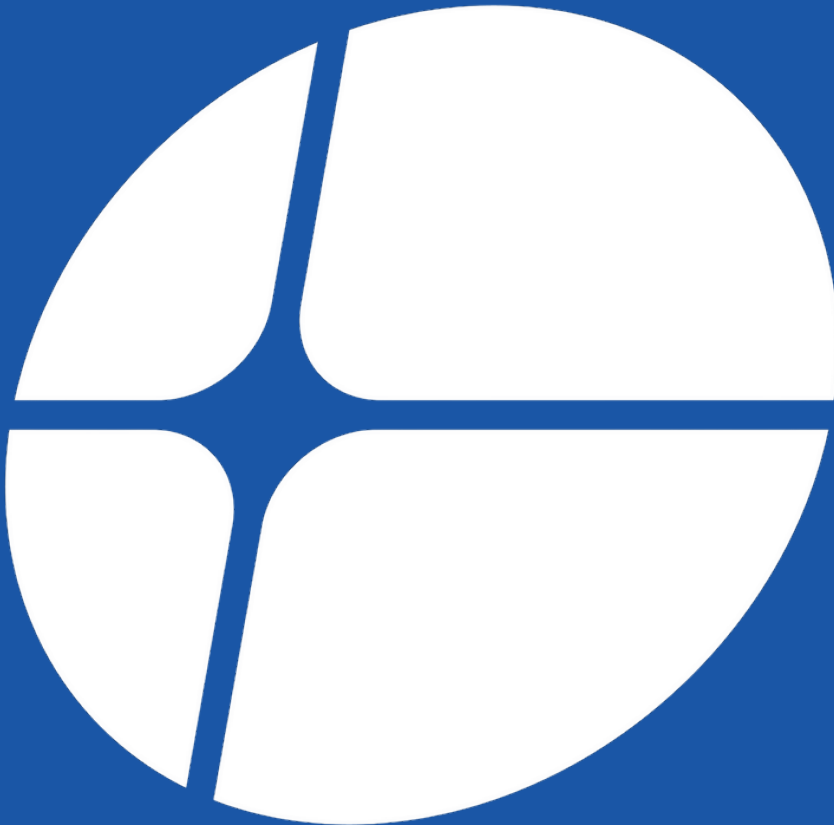


Attachment A

Amended Clause 4.6 Request

Clause 4.6

Request to vary a development standard



Hand Painted Advertising Mural
4-6 York Street, Sydney

Prepared for Apparition Media

Submitted to the City of Sydney Council

October 2025

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1. Introduction

This is a written request (the Request) to seek a variation to a development standard in accordance with the provisions of Clause 4.6 Exception to Development Standards of the *Sydney Local Environmental Plan 2012* (SLEP 2012).

This Request relates to *Clause 3.20(2)(b)(iii) Wall advertisements* of the *State Environmental Planning Policy (Industry and Employment) 2021* (Industry and Employment SEPP)

This Request has considered the detailed guidance within the NSW Department of Planning, Housing and Infrastructure's (DPHI) guideline *Guide to Varying Development Standards* (DPHI Guide) and addresses the findings and established principles (as relevant) in the following judgements of the NSW Land and Environment Court (the Court):

- *Adbooth Pty Ltd v Botany Bay City Council* [2006] NSWLEC 710
- *Wehbe v Pittwater Council* [2007] NSWLEC 827
- *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118
- *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131

The following sections of this Request critically analyse the proposed exceedance of the signage area, its impact and reasonableness.

This analysis demonstrates that an exception to the signage area development standard is warranted in this instance and will provide for a significantly better urban outcome than a compliant development.

2. Planning Overview

The *Standard Instrument (Local Environmental Plans) Order 2006* (Standard Instrument) includes various development standards as a means of achieving environmental planning objectives.

Clause 4.6 of the Standard Instrument allows a consent authority to consider and grant consent to a development even in the circumstance where that development would contravene a development standard.

The DPHI Guide recommends that any request to vary a development standard should confirm the planning context and relevant controls to assist the consent authority's assessment. Table 1 below provides a summary of the relevant planning context and provides an overview of the proposed variation.

Information Requirement	Comment
Relevant Applicable Planning Instrument	<i>State Environmental Planning Policy (Industry and Employment) 2021</i>
Zoning of the Land	SP5 Metropolitan Centre
Objectives of the Zone	The objectives of the SP5 zone are: • <i>To recognise and provide for the pre-eminent role of business, office, retail, entertainment and tourist premises in Australia's participation in the global economy</i> • <i>To provide opportunities for an intensity of land uses commensurate with Sydney's global status</i> • <i>To permit a diversity of compatible land uses that are characteristic of Sydney's global status and that serve the workforce, visitors and wider community</i> • <i>To encourage the use of alternatives to private motor vehicles, including public transport, walking and cycling</i> • <i>To promote land uses with active street frontages within podiums that contribute to the character of the street</i> • <i>To promote the efficient and orderly development of land in a compact urban centre</i> • <i>To promote a diversity of commercial opportunities varying in size, type and function, including new cultural, social and community facilities</i> • <i>To recognise the important role that central Sydney's public spaces, streets and amenity play in a global city</i> • <i>To promote the primary role of the zone as a centre for employment and permit residential accommodation and serviced apartments where the accommodation complements employment-generating land uses</i>
Development Standard to be Varied	Wall advertisements – as it relates to elevation coverage
Nature of the Development Standard	A numerical standard for the advertising area of wall advertisements on the above ground elevation
Relevant Development Standard Clause	Clause 3.20(2)(b)(iii) (our emphasis in bold) <i>(1) Only one wall advertisement may be displayed per building elevation.</i>

Information Requirement	Comment
	(2) The consent authority may grant consent to a wall advertisement only if— <i>(a) the consent authority is satisfied that the advertisement is integrated with the design of the building on which it is to be displayed, and</i> (b) for a building having— <i>(i) an above ground elevation of 200 square metres or more—the advertisement does not exceed 10% of the above ground elevation, and</i> <i>(ii) an above ground elevation of more than 100 square metres but less than 200 square metres—the advertisement does not exceed 20 square metres, and</i> (iii) an above ground elevation of 100 square metres or less—the advertisement does not exceed 20% of the above ground elevation, and
Objectives of the Development standard	There are no objectives specifically relating to CI 3.20(2)(b)(iii), however the objectives for Chapter 3 of the Industry and Employment SEPP are relevant: (1) This Chapter aims— <i>(a) to ensure that signage (including advertising)—</i> <i>(i) is compatible with the desired amenity and visual character of an area, and</i> <i>(ii) provides effective communication in suitable locations, and</i> <i>(iii) is of high quality design and finish</i>
Development Standard Numeric Control for the Site	Maximum advertising area of no more than 20% of the above ground elevation if the above ground elevation of the building is 100m ² or less.
Proposed Numeric Control	The subject site has an above ground elevation of 66.2m ² . The proposed sign is 24.1m ² , resulting in an advertisement of approximately 36% of the above ground elevation.
Percentage Variation Between the Proposal and the Planning Instrument	An exceedance of 16% of the requirement under CI 3.20 of the Industry and Employment SEPP.

Table 1: DPHI Guide recommended planning information and numeric overview

3. Proposed Development

This Request supports a DA for the installation of a hand painted advertising mural at 4-6 York Street. The site location is shown in the figures below.



Figure 1: Site location (Base Source: Nearmap)

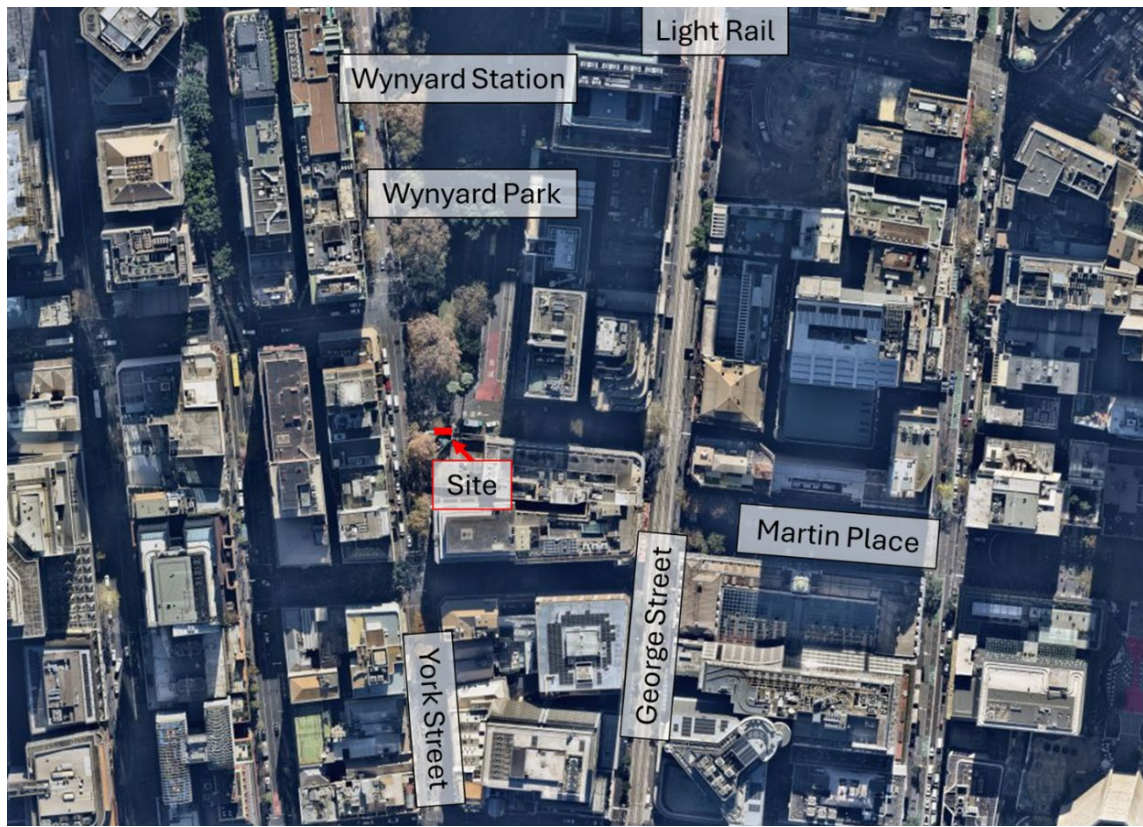


Figure 2: The site in its immediate context (Base Source: Nearmap)

The proposal involves the installation of a static hand painted advertising mural on the northern elevation of 4-6 York Street, measuring 7.2 metres in width and 3.3 metres in height for a 5-year period. The mural will present to Wynyard Street.

Key features of the proposal are as follows:

- total display area of approximately 24.1m² (7.2m x 3.3m)
- the advertising mural will be hand painted and non-illuminated
- the brand logos will not cover more than 5% of the mural
- contents of the mural will change sporadically

The proposed advertising area is 24.1m². The proposed advertising mural is shown in the figure below and within the architectural plans prepared by Rob Pickett Design provided at Appendix 1.

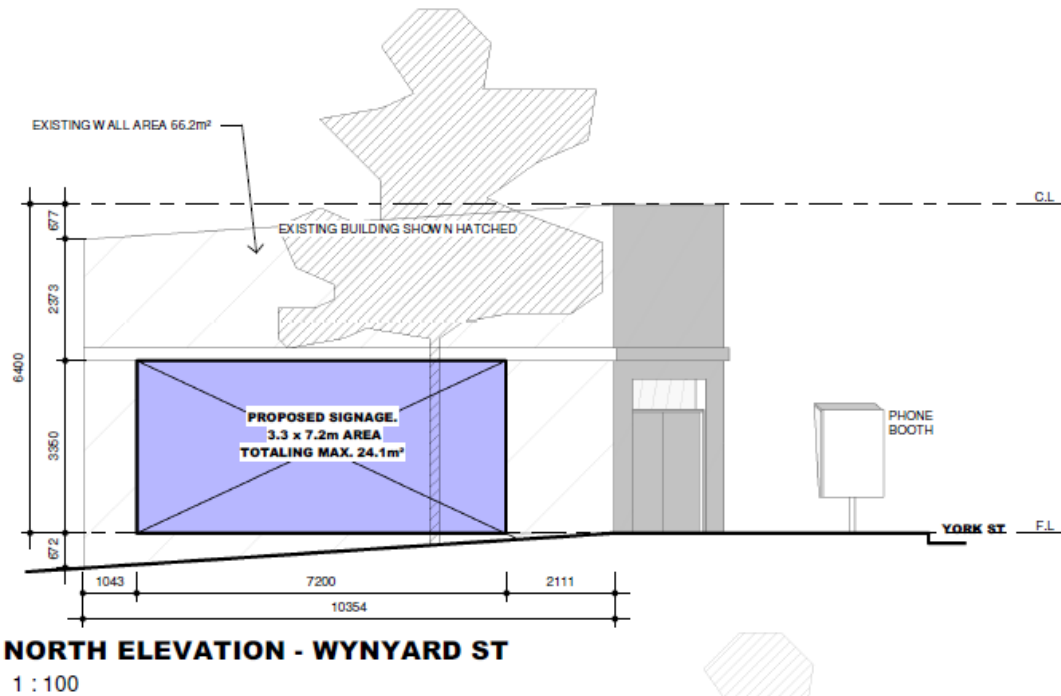


Figure 3: Northern Elevation (Source: Rob Pickett Design)

3.1. Proposed variation

The proposed variation is requested to accommodate a hand painted advertising mural of 24.1m² on the northern elevation of a single storey building at 4-6 York Street. This variation represents a 10.9m² increase in signage area.

4. Legislative Context

4.1. Clause 4.6 Exceptions to Development Standards

Clause 4.6 of the SLEP 2012 sets out key assessment criteria which enables Council to consider and grant development consent for a development that contravenes a development standard. The overarching objectives of this clause are contained in subclause (1) as detailed below:

- (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
- (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

Clause 4.6(2) of SLEP 2012 provides that, unless expressly excluded from the operation of clause 4.6, and subject to clause 4.6, development consent may be granted for development even though the development would contravene a development standard imposed by the SLEP 2012 or any other environmental planning instrument.

The Industry and Employment SEPP is an environmental planning instrument (EPI).

4.1.1. Clause 4.6(3)

Clause 4.6(3) requires that development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—

- (a) *compliance with the development standard is unreasonable or unnecessary in the circumstances, and*
- (b) *there are sufficient environmental planning grounds to justify the contravention of the development standard.*

4.2. Relevant Judgements - NSW Land and Environment Court

The following key Land and Environment Court (NSW LEC) judgements provide guidance on key considerations in the assessment of a Clause 4.6 variation Request. These judgements focus on the degree to which a consent authority may be satisfied about the matters in Clause 4.6 and therefore further refine the requirements for variation Requests:

- *Wehbe v Pittwater Council* [2007] NSWLEC 827
- *Adbooth Pty Ltd v Botany Bay City Council* [2006] NSWLEC 710
- *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118
- *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131

The key findings and established principles (as relevant) of the above judgements of the Land and Environment Court are summarised below.

4.2.1. Wehbe v Pittwater Council (2007)

This case establishes five potential grounds 'Wehbe tests' to ascertain whether strict compliance with a development standard is unreasonable or unnecessary, as follows:

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable; or
5. The compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.

4.2.2. Adbooth Pty Ltd v Botany Bay City Council (2006)

In *Adbooth Pty Ltd v Botany Bay Council* [2006] (Adbooth) the Commissioner had considered that compliance with CI 22(2)(b) of State Environmental Planning Policy 64 (SEPP 64) was unreasonable and unnecessary. It is important to note that SEPP 64 was repealed and replaced by the Industry and Employment SEPP, and the above clause is identical to CI 3.20(2)(b). This decision is evidence of the applicable control being applied as a development standard in the Land and Environment Court, and hence subject to Clause 4.6 of the SLEP 2012.

4.2.3. Initial Action Pty Ltd v Woollahra Municipal Council (2018)

Initial Action Pty Ltd v Woollahra Municipal Council [2018] (Initial Action) further clarifies the correct approach for the consideration of clause 4.6 requests. Clause 4.6 does not require that a development that contravenes a development standard to have a *neutral* or *better* environmental planning outcome than a fully compliant development.

A legal consequence of the decision in *Initial Action* is that Clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

In *Initial Action*, the Court also confirmed that the five common ways of establishing that compliance with a development standard is unreasonable and unnecessary as identified in *Wehbe v Pittwater Council* (2007) continue to apply.

4.2.4. Linfield Developments Pty Ltd v Cumberland Council (2019)

The 'third' Wehbe test is concerned with the underlying object or purpose of the development standard and that it would be defeated, thwarted or undermined if strict compliance was required. The reference to 'undermined' is an extension of Wehbe which was applied in *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 (at [24]) (Linfield). In Linfield, the court found that:

"...requiring compliance would thwart or undermine at least one of the objectives of the height control development standard..."

5. Assessment of the Variation to advertising area development standard

The Industry and employment SEPP sets a standard advertising area development control of 20% elevation coverage for the northern elevation of the site.

The proposal seeks to increase the maximum elevation coverage development standard development control by 10.9m², resulting in an elevation coverage of 36%, to accommodate wall signage that is appropriate for the conditions of the site and its context, both physically and strategically, and which is envisaged for the site under the Industry and Employment SEPP.

The following assessment comprehensively considers the provisions of Clause 4.6 with regard to the relevant case law.

5.1. Clause 4.6(3)(a) – Compliance is Unreasonable or Unnecessary

Wehbe establishes at least five potential alternative grounds to ascertain whether strict compliance with a development standard is unreasonable or unnecessary. An assessment against the relevant tests is provided below to outline how compliance with the advertisement area development standard is unreasonable and unnecessary.

5.1.1. Wehbe Test 1: The objectives of the standard are achieved notwithstanding non-compliance with the standard

No objectives are set out specifically for wall advertisements. Nonetheless, an assessment has been undertaken against the objectives of Chapter 3 of the Industry and Employment SEPP and provided in the below table which confirms that the objectives of the SEPP as they relate to advertising and signage will be achieved notwithstanding the non-compliance with the standard.

Clause 3.1 Aims, objectives etc	
Objectives	Achievement of Objectives
(1) This Chapter aims-	
(a) To ensure that signage (including advertising)-	
(i) Is compatible with the desired amenity and visual character of an area	An identified principle of the Wynyard Park/Lang Park Special Character Area in Section 2.1.9 of the Sydney Development Control Plan 2012 (SDCP 2012) is to enhance the terminating vistas along Carrington Street, and York Street to the south at its corner with Wynyard Street. The provision of an advertising mural on the subject site creates a point of visual interest at the intersection between York Street and Wynyard Street, directly aligning with the desired visual character of the area.

Clause 3.1 Aims, objectives etc		
(ii)	Provides effective communication in suitable locations	The proposed advertising mural is located to primarily be viewed by pedestrians travelling southbound along York Street, which is a suitable location for an advertising mural as it provides the opportunity to support the activation of the Wynyard Precinct through artistic displays.
(iii)	Is of high quality design and finish	The proposal is seeking to display hand painted advertising murals, which are intended to be designed to a quality that the mural is perceived as public art rather than an advertising billboard.

Table 2: Consistency with Clause 3.1 objectives

5.1.2. Wehbe Test 2: The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary

No objectives have been set out for wall advertisements. An assessment against the objectives of Chapter 3 of the Industry and Employment SEPP is provided in Table 2.

However, the underlying purpose of the development standard is to control the coverage of wall advertisements on building elevations to ensure that they are proportionate to the elevation it is located on. The underlying purpose of the control is considered relevant to the development.

Notwithstanding, as discussed throughout the SEE and this Request, it is considered that the increase in advertising area will facilitate a positive urban design impact due to the artistic element of the hand painted nature of the proposed advertising mural, as opposed to a regular billboard style advertisement. The size exceedance will support an improved display compared to a wholly compliant model which otherwise exposes a blank façade.

Furthermore, as detailed within the SEE, the proposal is considered to support the City of Sydney's *Public Art Policy*. In particular, the scale of the mural is appropriate for the building it is located on, and to the broader context of the site, which aligns with the guidelines included in the Policy.

5.1.3. Wehbe Test 3: The underlying object or purpose would be defeated, thwarted or undermined if compliance was required and therefore compliance is unreasonable

Strict compliance with the advertising area development standard would defeat, thwart and undermine the objectives of the chapter and the underlying intention of the standard. This was applied in *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 (at [24]).

The objects that would be defeated, thwarted or undermined if strict compliance was required in this case are clause 3.1(a)(i), clause 3.1(a)(ii) and clause 3.1(1)(a)(iii) of the Industry and Employment SEPP as detailed below.

Clause 3.1(1)(a)(i) states:

To ensure that signage (including advertising) is compatible with the desired amenity and visual character of an area

A strictly compliant scheme would limit the sign's ability to align the desired amenity and visual character of the locality. The proposed mural directly aligns with Principle (e) of the Wynyard Park/Lang Park Special Character Area, reproduced as follows:

Enhance the terminating vistas along Carrington Street, and York Street to the south at its corner with Wynyard Street.

A wholly compliant advertising display would have an advertising area of 13.22m². A mural of that size would leave a significant portion of the elevation to be blank and unappealing. As such, a non-compliant advertising display will better align with the desired character of the area and assist in providing an appropriate terminating vista along York Street.

Clause 3.1(1)(a)(ii) states:

To ensure that signage (including advertising) provides effective communication in suitable locations

The site is considered to be in a suitable location because it is primarily visible towards a high-traffic pedestrian walkway, while having minimal adverse impacts on the surrounding environment, as detailed throughout this application. Complying with the advertising area development standard would limit the ability to interpret the mural and limit its artistic merit. A smaller display area would have less of a positive visual impact on the existing unappealing building façade, as such, compliance is unreasonable and unnecessary as it will undermine the objectives of the SEPP.

Clause 3.1(1)(a)(ii) states:

To ensure that signage (including advertising) is of a high quality design and finish

As above, a strictly compliant wall advertisement would result in a significantly smaller advertising area, which will limit the ability to interpret the mural and limit its artistic merit.

The scale of the proposal mural enables a high-quality design to be achieved and improves the overall presentation of the building's northern façade.

5.2. Clause 4.6(3)(b) – Environmental Planning Grounds to Justify Contravening the Development Standard

The development, including the advertising coverage area non-compliance, will provide for a high-quality hand-painted advertising mural visible to an area of high pedestrian traffic.

There are sound planning grounds and significant benefits to justify contravening the height of building development standards of which are outlined in the following sections.

5.2.1. The need to comply with Clause 3.20(2)(b)(iii)

Section 1.3(c) of the EP&A Act provides that it is an objective of the Act to:

promote the orderly and economic use and development of land

The zone objectives of the SP5 Metropolitan Centre zone are:

- 1. To recognise and provide for the pre-eminent role of business, office, retail, entertainment and tourist premises in Australia's participation in the global economy.*
- 2. To provide opportunities for an intensity of land uses commensurate with Sydney's global status.*
- 3. To permit a diversity of compatible land uses that are characteristic of Sydney's global status and that serve the workforce, visitors and wider community.*
- 4. To encourage the use of alternatives to private motor vehicles, including public transport, walking and cycling.*
- 5. To promote land uses with active street frontages within podiums that contribute to the character of the street.*
- 6. To promote the efficient and orderly development of land in a compact urban centre.*
- 7. To promote a diversity of commercial opportunities varying in size, type and function, including new cultural, social and community facilities.*
- 8. To recognise the important role that central Sydney's public spaces, streets and amenity play in a global city.*
- 9. To promote the primary role of the zone as a centre for employment and permit residential accommodation and serviced apartments where the accommodation complements employment-generating land uses.*

The proposal supports the sixth objective of promoting the efficient and orderly development of land in a compact urban centre. The building that the mural is to be located on is currently unoccupied and on a corner lot immediately adjacent to public open space and nearby a transport interchange. The provision of an advertising mural represents orderly development creating activation on a building that is currently not contributing to the streetscape due to its blank façade.

The proposed development similarly supports the eighth objective of the zone by contributing to the vibrancy of the street through the activation of an otherwise blank wall along a busy pedestrian corridor.

Since the proposal is for an advertising mural, the zone objectives are not targeted towards the outcomes that the proposal will achieve. Notwithstanding, the development

will not hinder the ability of any neighbouring or future developments from achieving the zone objectives.

5.2.2. Improved Urban Design outcomes

Section 1.3(g) of the EP&A Act provides that it is an objective of the Act to:

promote good design and amenity of the built environment ...

The proposed development has been designed to provide a form of advertisement that offers improved amenity and visual outcomes despite being non-compliant. The increased area of the mural and coverage of the site's elevation compared to a compliant design creates a more prevalent point of street activation and visual interest as the display is designed to be interpreted as street art rather than an advertising billboard.

A smaller display would be less visible to pedestrians walking along York Street, and leave more of the northern elevation blank, which does not actively contribute to the streetscape, and is at a higher risk of graffiti/vandalism.

It is also noted that the non-compliant form of the proposal will not have increased adverse impacts compared to a smaller compliant advertising mural. As discussed throughout the Statement of Environmental Effects, the proposal is not expected to have a tangible adverse impact on road safety, surrounding heritage or the character of the area.

Enforcing a compliant model of this proposal is unreasonable and unnecessary as the proposal offers a superior urban design outcome.

6. Conclusion

Clause 4.6 allows for flexibility in the application of development standards in appropriate circumstance and this Request has been shown to satisfy the provisions of 4.6(3) of the SLEP 2012.

The advertising area coverage variation is justified for the following reasons:

- Clause 3.20(2)(b)(iii) of the Industry and Employment SEPP was not created for the purpose of an advertising mural that can readily be identified as street art
- the proposal seeks to be painted onto what is currently a blank façade on an unoccupied building, activating the elevation as it presents to the street
- this non-compliance results from the limited size of the building and would likely comply with this clause if this building was of a size that would ordinarily be expected on this site
- offers an improved urban design outcome with positive visual impacts compared to that of a compliant scheme
- enhances the terminating vistas of York and Carrington streets, as set out in the special character statement within the SDCP
- respects the rights of other advertisers on transport structures
- the mural is of a scale that is compatible with the building it is on, and will not interact with any important architectural features, windows or extending across corners.
- the proposal is generally consistent with the relevant provisions of the *City of Sydney Public Art Policy 2016*
- protects a larger portion of the façade from graffiti and other vandalism by providing a point of visual interest
- will not reduce the significance of any nearby heritage
- will not reduce traffic safety in the surrounding area

Overall, and for the reasons set out above, the proposed development represents a superior outcome for the site that is justified. Therefore, it is appropriate that the development standard be varied as proposed.